



E-Filed on 9/4/07

1 3993 Howard Hughes Parkway, Suite 600  
 2 Las Vegas, NV 89169-5996  
 3 Facsimile (702) 949-8321  
 4 Telephone (702) 949-8320

5 Susan M. Freeman AZ State Bar No. 004199  
 6 Email: [sfreeman@lrlaw.com](mailto:sfreeman@lrlaw.com)  
 7 Rob Charles NV State Bar No. 006593  
 8 Email: [rcharles@lrlaw.com](mailto:rcharles@lrlaw.com)  
 9 John Hinderaker AZ State Bar No. 018024  
 10 Email: [jhinderaker@lrlaw.com](mailto:jhinderaker@lrlaw.com)

5 Attorneys for USACM Liquidating Trust  
 6 ORRICK, HERRINGTON & SUTCLIFFE LLP  
 7 MARC A. LEVINSON (CA 57613, pro hac vice)  
 8 JEFFERY D. HERMANN (CA 90445, pro hac vice)  
 9 400 Capitol Mall  
 10 Sacramento, California 95814  
 Telephone: (916) 447-9200  
 Facsimile: (916) 329-4900  
 Email: [malevinson@orrick.com](mailto:malevinson@orrick.com)  
[jhermann@orrick.com](mailto:jhermann@orrick.com)

10 Attorneys for Post-Effective Date USA Capital Diversified Trust Deed Fund, LLC

BECKLEY SINGLETON, CHTD.  
 BOB L. OLSON (NV 003783)  
 ANNE M. LORADITCH (NV 008164)  
 530 Las Vegas Boulevard South  
 Las Vegas, NV 89101  
 Telephone: (702) 385-3373  
 Facsimile: (702) 385-5024  
 Email: [bolson@beckleylaw.com](mailto:bolson@beckleylaw.com)  
[aloraditch@beckleylaw.com](mailto:aloraditch@beckleylaw.com)

## UNITED STATES BANKRUPTCY COURT

### DISTRICT OF NEVADA

13 In re:

14 USA COMMERCIAL MORTGAGE COMPANY,  
 15 USA CAPITAL REALTY ADVISORS, LLC,  
 16 USA CAPITAL DIVERSIFIED TRUST DEED FUND,  
 LLC,  
 17 USA CAPITAL FIRST TRUST DEED FUND, LLC,  
 18 USA SECURITIES, LLC,

19 Debtors.

20 **Affects:**

- All Debtors
- USA Commercial Mortgage Company
- USA Capital Realty Advisors, LLC
- USA Capital Diversified Trust Deed Fund, LLC
- USA Capital First Trust Deed Fund, LLC
- USA Securities, LLC

Case No. BK-S-06-10725-LBR  
 Case No. BK-S-06-10726-LBR  
 Case No. BK-S-06-10727-LBR  
 Case No. BK-S-06-10728-LBR  
 Case No. BK-S-06-10729-LBR

### CHAPTER 11

Jointly Administered Under Case No. BK-S-06-10725 LBR

### Objection of USACM Trust To William and Carolyn Bolding's Claim Filed in Wrong Debtor's Case; Objection of DTDF to Proposed Allowance of Claim; and Certificate of Service

Hearing Date: October 15, 2007  
 Hearing Time: 9:30 a.m.

24 William and Carolyn Bolding ("Bolding") filed Proof of Claim No. 10725-01275  
 25 against USA Commercial Mortgage Company ("USACM") in the amount of \$48,047.32.  
 26 The USACM Liquidating Trust (the "USACM Trust") hereby objects to Bolding's claim.

1 The basis for the claim is shown on the face of the proof of claim and in the attachment as  
 2 an investment in USA Capital Diversified Trust Deed Fund, LLC (“DTDF”).

3 Accordingly, it is a claim that was incorrectly filed in the USACM case. The USACM  
 4 Trust respectfully requests that this claim be disallowed as a claim against USACM.

5 Although DTDF has not yet filed a formal proof of claim against USACM, and there is no  
 6 deadline for it to do so, DTDF has informally asserted a claim in excess of \$100 million  
 7 and the parties have participated in one unsuccessful mediation on this and other issues.

8 Because DTDF does assert a significant claim against USACM, any claim held by Bolding  
 9 against USACM solely on account of the investment in DTDF is derivative of DTDF’s  
 10 claims against USACM, and Bolding may not prosecute such claims on Bolding’s own  
 11 behalf.

12 In *In re Van Dresser Corp.*, plaintiff was a shareholder of Van Dresser, which  
 13 owned two subsidiaries.<sup>1</sup> The president of Van Dresser looted the subsidiaries, ultimately  
 14 forcing them and Van Dresser into bankruptcy. The plaintiff had guaranteed \$1.125  
 15 million in loans to the debtor, and had to repay them when debtor defaulted. Plaintiff then  
 16 sued the debtor’s principal, and two other defendants (who he alleged aided and abetted  
 17 the corporate looting) for various torts, including conversion, breach of fiduciary duty, and  
 18 civil conspiracy.

19 The court stated that a debtor’s trustee has the exclusive right to assert a debtor’s  
 20 claims, and that a claim belongs solely to the debtor’s estate if the debtor could have raised  
 21 the claim at the commencement of the bankruptcy case.<sup>2</sup> Additionally, if a judgment  
 22 against a defendant by either the debtor or another party asserting the debtor’s claim  
 23

24  
 25 <sup>1</sup> *In re Van Dresser Corp.*, 128 F.3d 945 (6<sup>th</sup> Cir. 1997).  
 26 <sup>2</sup> *Id.* at 947 (citing *In re Educators Group Health Trust*, 25 F.3d 1281, 1284 (5<sup>th</sup> Cir. 1994); see also *In re Real Marketing Services, LLC*, 309 B.R. 783 (S.D. Cal. 2004) (citing *Van Dresser* with approval in a case involving an LLC debtor).

1 precludes the other from recovery, then the claims are not independent of each other and  
2 belong exclusively to the debtor.<sup>3</sup>

3 Thus, because both the plaintiff and the debtor corporation could state claims for  
4 damages against the defendants, but only one could recover on those claims, by default the  
5 claims were exclusively property of the Van Dresser trustees.<sup>4</sup> In order for a plaintiff to  
6 bring a claim, either the trustee must have truly abandoned the claim, or the plaintiff must  
7 be able to allege a distinct and specific injury.<sup>5</sup>

8 Similarly, in *In re Real Marketing*, the debtor had attempted to enter into an asset  
9 purchase agreement that specifically included the assumption of debt owed to the debtor's  
10 managing member. The agreement fell through, and after the managing member filed an  
11 involuntary petition for relief against the debtor, the managing member asserted various  
12 causes of action against the purchasing company, including contract claims, debt  
13 assumption claims, misrepresentation claims, and interference claims.<sup>6</sup> The court,  
14 however, found that all of the claims involved both the debtor's managing member and the  
15 debtor itself, and thus the right to pursue all of the causes of action resided with the  
16 trustee.<sup>7</sup>

17 DTDF further objects to any allowance of Bolding's claim as a claim against the  
18 DTDF estate. DTDF has determined that Bolding has an allowed proof of interest in the  
19 DTDF case in the amount of \$48,047.32. This objection does not seek to prejudice the

---

21 <sup>3</sup> *Id.*

22 <sup>4</sup> *Id.* at 948.

23 <sup>5</sup> *Id.* at 949 (for example, a claim for the attorneys' fees plaintiff incurred defending the  
suits on the guaranty).

24 <sup>6</sup> *In re Real Marketing*, 309 B.R. 783, 786-87 (S.D. Cal. 2004).

25 <sup>7</sup> See also *In re Ionosphere Clubs, Inc.*, 156 B.R. 414 (S.D.N.Y. 1993) (courts determine  
whether action is individual or derivative based on state law, and the preferred  
shareholders breach of fiduciary duty claims were derivative per Delaware law); *In re Van  
Dresser*, 128 F.3d at 947 ("whether a creditor has sole right to a cause of action is  
determined in accordance with state law").



1 rights of Bolding as a DTDF member to recover from the DTDF estate on a pro rata basis  
 2 on account of Bolding's membership interest in the amount of \$48,047.32. Bolding shall  
 3 retain an interest in DTDF in the amount of \$48,047.32, as reflected in the books and  
 4 records of DTDF, and Bolding is entitled to receive distributions on a pro rata basis with  
 5 all other DTDF members.

6 Accordingly, the USACM Trust and DTDF seek entry of an order that will disallow  
 7 the Bolding's claim against USACM, disallow any proposed allowance of the Bolding's  
 8 claim in the DTDF case, and appropriately allow Bolding to retain an equity interest in  
 9 DTDF in the amount of \$48,047.32 as reflected in the books and records of DTDF as of  
 10 April 13, 2006.

11 This objection is made pursuant to Bankruptcy Code section 502, Federal Rule of  
 12 Bankruptcy Procedure 3007, and Local Rule of Bankruptcy Practice 3007.

13 Dated: September 4, 2007.

14 **BECKLEY SINGLETON, CHTD.**

15 By /s/ Anne M. Loraditch  
 16 Bob L. Olson (NV Bar #3783)  
 17 Anne M. Loraditch (NV Bar # 8164)  
 18 530 Las Vegas Boulevard South  
 Las Vegas, Nevada 89101  
 Telephone: (702) 385-3373

19 and

20 **ORRICK, HERRINGTON &**  
**SUTCLIFFE LLP**  
 21 Marc A. Levinson  
 Jeffery D. Hermann  
 22 400 Capitol Mall, Suite 3000  
 Sacramento, California 95814-4497  
 23 *Attorneys for Post-Effective Date USA*  
*Capital Diversified Trust Deed Fund, LLC*

24 **LEWIS AND ROCA LLP**

25 By: /s/ Rob Charles (006593)  
 26 Susan M. Freeman  
 Rob Charles  
 John Hinderaker  
 3993 Howard Hughes Parkway, Suite 600  
 Las Vegas, NV 89169-0961  
 Facsimile (702) 949-8321  
 Telephone (702) 949-8320  
*Counsel For USACM Liquidating Trust*



## Certificate of Service

I certify that a copy of the foregoing was served via first class mail, postage prepaid, addressed as set forth below, on this 4th day of September, 2007 to:

William and Carolyn Bolding  
3961 Arizona Ave  
Las Vegas, NV 89104

/s/ Renee L. Creswell

---

Renee L. Creswell  
Lewis and Roca LLP